UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW And CHARLES KURZMAN,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 18-1860 (RDM)
UNITED STATES DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

The United States Department of Justice ("DOJ") submits this memorandum in support of its response to the Opposition to its Motion for Summary Judgment and the Cross Motion for Summary Judgment filed by the Brennan Center for Justice and Charles Kurzman ("Plaintiffs"). Plaintiffs fail to demonstrate that the Freedom of Information Act ("FOIA") mandates disclosure of the records they are seeking—court docket numbers pertaining to terrorism prosecutions compiled within DOJ's Legal Information Office Network System ("LIONS") database.

I. Docket Numbers Are Protected Records Under Exemptions 6 and 7(C).

a. Exemption 6.

As a threshold matter, Plaintiffs argue that docket numbers are not "personnel and medical files and similar files" under Exemption 6. 5 U.S.C. § 552(b)(6). What constitutes a "similar file," however, was established by *U.S. Department of State v. Washington Post Co.*, 456 U.S. 595 (1982), where the Supreme Court held Congress intended "similar files" to be interpreted broadly. *Id.* at 599-603 (citing H.R. Rep. No. 89-1497, at 11 (1966); S. Rep. No. 89-813, at 9 (1965); S.

Rep. No. 88-1219, at 14 (1964)). The protection of an individual's privacy, the Court explained, "surely was not intended to turn upon the label of the file which contains the damaging information." *Id.*; *see Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006) ("The Supreme Court has read Exemption 6 broadly, concluding the propriety of an agency's decision to withhold information does not 'turn upon the label of the file which contains the damaging information'") (quoting *Wash. Post*)).

Rather, *Washington Post* made clear that data which "applies to a particular individual" meets the threshold requirement for Exemption 6 protection. 456 U.S. at 602; *see, e.g.*, *Carter, Fullerton & Hayes LLC v. FTC*, 520 F. Supp. 2d at 144-45 (D.D.C. 2007) (concluding the FTC met the threshold for Exemption 6 regarding names of consumers who filed complaints because "each piece of information withheld by defendants applies to specific individuals"); *Bigwood v. USAID*, 484 F. Supp. 2d 68, 76 (D.D.C. 2007) ("[T]he organizational identity of USAID grantees is information which … 'applies to a particular individual,' and thus the records requested are 'similar files' which may be protected from disclosure by Exemption 6") (citation omitted)).

Logically, if information that "applies to a particular individual" falls within Exemption 6, *Wash. Post*, 456 U.S. at 602, data which can reveal whether an individual has been prosecuted, along with the personal details of such prosecution, falls squarely within Exemption 6. Indeed, even Plaintiffs emphasize that "the primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters in [personnel] files[.]" *See* Pls' Resp. at 11-12 (citing *Dep't of Air Force v. Rose*, 425 U.S. 352, 376 n.14 (1976)). Similar to personnel files, docket numbers contain data about personal matters, which Congress plainly intended to protect. Accordingly, Plaintiffs threshold challenge to Exemption 6 should be rejected.

b. Exemption 7(C).[1]

In addition to the foregoing threshold challenge, Plaintiffs argue docket numbers do not qualify as "records or information compiled for law enforcement purposes" under Exemption 7(C). 5 U.S.C. § 552(b)(7)(C). In making their determinations of threshold Exemption 7 applicability, courts have focused on the content and purpose for compiling each item of information involved, regardless of the overall character of the record in which it happens to be maintained. *See FBI v. Abramson*, 456 U.S. 615, 624, 626 (1982) (the "threshold requirement for qualifying under Exemption 7 turns on the purpose for which the document sought to be withheld was prepared"). The D.C. Circuit "has long emphasized that the focus is on how and under what circumstances the requested files were compiled[,]" "whether the records relate to anything that can fairly be characterized as an enforcement proceeding," and if the activity "is for a possible violation of law, then the inquiry is for law enforcement purposes." *Jefferson v. DOJ*, 284 F.3d 172, 176-77 (D.C. Cir. 2002); *see also Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982) (setting forth a two-part test).

Courts have held Exemption 7's law enforcement purpose applies to database records. *See, e.g., Vazquez v. DOJ*, 887 F. Supp. 2d 114, 117 (D.D.C. 2012) (records maintained in FBI's National Crime Information Center); *Antonelli v. ATF*, 2006 WL 141732, at *4 (D.D.C. Jan. 18, 2006) (records "maintained in the Prisoner Processing and Population Management/Prison Tracking System and in the Warrant Information Network" compiled for ATF law enforcement);

[1] Exemption 7 was broadened pursuant to the Freedom of Information Reform Act of 1986. *See* Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48; *see also North v. Walsh*, 881 F.2d 1088, 1098 n.14 (D.C. Cir. 1989) (explaining Congress "changed the threshold requirement for withholding" so that "it now applies more broadly"). Specifically, the amendment eliminated the requirement that records be "investigatory" files and made the exemption available to "records or information compiled for law enforcement purposes." *See Jordan v. DOJ*, Appeal No. 10-1469, 2011 WL 6739410, at *7 (D.C. Cir. Dec. 23, 2011) (noting that "Congress modified Exemption 7" to broaden its scope).

Roberts v. FBI, 2012 WL 604178, at *4-5 (D.D.C. Feb. 24, 2012) (it "is apparent from the nature of plaintiff's FOIA request that the information he seeks was compiled for law enforcement purposes, namely, the criminal prosecution of plaintiff"); *see also Pub. Emps. for Envtl. Responsibility v. U.S. Section Int'l Boundary & Water Comm'n*, 839 F. Supp. 2d 304, 324-326 (D.D.C. 2012) (agency's protective measures for dam safety satisfy law enforcement threshold because dams might be attractive targets for terrorists).

Plaintiffs emphasize that court docket numbers are first generated by a court and then compiled by DOJ within in its LIONS database in order to track cases and organize information. *See* Pls' Resp. at 11-12. That such information is initially generated by a court is of no moment. The Supreme Court has held that information not initially generated for law enforcement purposes may qualify under Exemption 7 if it is subsequently compiled for a valid law enforcement purpose at any time prior to "when the Government invokes the Exemption." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989); *Kansi v. DOJ*, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (explaining that once documents become assembled for law enforcement purposes, "all [such] documents qualify for protection under Exemption 7 regardless of their original source").

Plaintiffs further claim that docket court numbers are too attenuated from actual law enforcement activity for purposes of Exemption 7(C), primarily relying upon the D.C. Circuit's decision in *Bartko* v. *DOJ*, 898 F.3d 51 (D.C. Cir. 2018). *See* Pls' Resp. at 10-12. *Bartko*, however, never engaged in any discussion about what constitutes actual law-enforcement activity, much less what is too attenuated from activity for purposes of Exemption 7(C). 898 F.3d at 51. Rather, *Bartko* only found that DOJ's Office of Professional Responsibility ("OPR") failed to show that that records at issue (*i.e.*, allegations against a prosecutor) would have been compiled for law enforcement purposes, where they related to internal disciplinary matters. *Bartko* 898 F.3d

at 64-65. Although *Bartko* recognized that "[c]ourts generally afford some deference to agencies 'specializing in law enforcement' that claim their records are eligible for Exemption 7(C)[,]" *id.* at 65 (citing *Center for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 926 (D.C. Cir. 2003)), it found OPR was not such an agency and that discipline was its mission as opposed to investigating crime. *Id.* at 65-66.

In contrast, *Center for National Security Studies* involved a FOIA request to DOJ seeking information about persons who were detained in response to a terrorist attack. 331 F.3d at 921. Among other things, the D.C. Circuit held the names of the detainees were compiled for law enforcement purposes, and rejected Plaintiffs' claim that they fell outside Exemption 7 because they were contained in public records:

> Plaintiffs are seeking a comprehensive listing of individuals detained during the post-September 11 investigation. The names have been compiled for the "law enforcement purpose" of successfully prosecuting the terrorism investigation. As compiled, they constitute a comprehensive diagram of the law enforcement investigation after September 11. Clearly this is information compiled for law enforcement purposes.

Id. at 926. If a list of detainees (*i.e.*, terrorism suspects) constitutes "a comprehensive diagram of the law enforcement investigation after September 11," *id*., surely docket numbers of terrorism prosecutions from which the names of terrorism suspects can be derived—data that is compiled by DOJ in a database that tracks cases and organizes information in order to prosecute terrorism—must constitute a similar diagram of DOJ's law-enforcement terrorism investigations. *Id*.[2]

[2] Accordingly, *Lardner v. DOJ*, on which Plaintiffs rely, actually supports Defendant's position. 398 F. App'x 609 (D.C. Cir. 2010). There, the Court ordered disclosure of a list prepared by the White House of persons whose pardon applications had been denied by the President. *Id*. at 611. The D.C. Circuit distinguished the list itself from records compiled as part of an investigation conducted by the Office of the Pardon Attorney ("OPA"), because the list was designed to inform OPA of the President's determinations, and was not data from OPA's investigative records. *Id*.

Finally, Plaintiffs claim that if the Court holds that data in the LIONS database is compiled for law-enforcement purposes, it would "gut FOIA" as applied to DOJ. *See* Pls' Resp. at 11-12. Such concern is belied by *ACLU v DOJ* in which the Court assumed court docket numbers came under Exemptions 7(C) and nevertheless still mandated disclosure of 3,772 court docket numbers. 655 F.3d 1, 6 (D.C. Cir. 2011) ("*ACLU I*"). Accordingly, based on the foregoing discussion, Plaintiffs' threshold challenges to DOJ's invocation of FOIA Exemptions 6 and 7(C) should summarily be rejected by the Court.

II. Disclosure of Docket Numbers for Cases Resulting in Convictions or Guilty Pleas Is Not Mandated by Clear Precedent.

Although the same privacy interest in public docket information exists here as in *ACLU I*, the nearly de minimis interest in *ACLU I* pales in comparison to the heighted interests at stake, which far outweighs any public interest in disclosure that Plaintiffs have attempted to articulate. As such, the Court should distinguish *ACLU I* and allow DOJ to withhold the court docket numbers for cases resulting in convictions or guilty pleas.

a. The Privacy Interests in Court Docket Numbers of Terrorism Cases Resulting in Convictions or Guilty Pleas Is Substantial.

Plaintiff concedes that the privacy interests in court docket numbers for cases resulting in convictions or guilty pleas is more than de minimis, albeit slightly more. *See* Pls' Resp. at 13. Because a "substantial privacy interest is *anything greater than a de minimis privacy interest*[,]" *Chase v. DOJ*, 301 F. Supp. 3d 146, 155 (D.D.C. 2018) (quoting *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229-30 (D.C. Cir. 2008) (emphasis added)), the privacy interests at stake here must be deemed substantial in light of the "heightened" concerns that terrorism convictions raise. *ACLU I*, 655 F.3d at 11 n.14.

Although the Court in *ACLU I* was ultimately not persuaded that when "a person has already been publicly charged and convicted *of a federal offense*, disclosure of that person's name *on a list of persons whose cell phones were tracked* will materially increase the number of his or her possible future friends and associates who will be exposed to the information," 655 F.3d at 10-11 (emphasis added), the Court presciently observed, "this is not to discount the possibility that a FOIA request might be worded in such a way as to generate *a list of convictions that, because of particularly stigmatic associations or otherwise, could draw special attention to the names on the list and so create heightened privacy concerns*." *Id.* at n.14 (emphasis added). That observation, which Plaintiffs have disregarded, contemplates that not all lists of convictions are created equal. Indeed, if there were ever a list that could draw "special attention" and "raise heightened concerns" in the forms of harassment, embarrassment, barriers to reintegration and renewed public attention, *id*., it is a list of terrorism convicts. *See* Def't Mot. at 8-11.

Rather than address the scope of Judge Garland's clear limitation on *ACLU I's* holding, Plaintiffs ignore this limitation and implicitly endorse a categorical rule of disclosure that deems all lists of convictions as equally stigmatic because they can only ever raise de minimus concerns. *ACLU I* makes clear no such rule applies since some lists can create heightened privacy concerns. 655 F.3d at 11 n.14. And instead of addressing Defendant's arguments that the list here does so, Plaintiffs mischaracterizes such arguments as "recycled" because they did not prevail in *ACLU I*. *See* Pls' Resp. at 15. But *ACLU I* only held the factors on which Defendant relies regarding stigma, as applied to that particular case and unique context, did not raise more than a de minimis interest. 655 F.3d at 10-11. *ACLU I* never categorically rejected the relevance of such factors in assessing the strength of a privacy interest in another context—like terrorism.

Finally, Plaintiffs reject the idea that the potential for violence or renewed contact could result if DOJ disclosed a list of docket numbers from which all terrorism convicts could be derived. In other words, Plaintiffs fail to appreciate that, could certain extremist groups access such list—say, domestic terror groups like the kind Plaintiffs want to study—unwanted contact could result. *Cf. Ctr. for Nat'l Sec. Studies*, 331 F.3d at 929 ("While the name of any individual detainee may appear innocuous or trivial, it could be of great use to al Qaeda in plotting future terrorist attacks or intimidating witnesses in the present investigation"). Plaintiffs observe that the Court in *ACLU I* had distinguished cases, including *U.S. Department of State v. Ray*, 502 U.S. 164 (1991), where "the intrusive contact likely to follow from disclosure was enormously greater than the relatively minimal potential contact at issue in this case." *ACLU I*, 655 F.3d at 11 n.15.

While *ACLU I* found that if a list of names showing defendants whose phones were tracked were disclosed, the potential for renewed attention was speculative, it clearly indicated that a list of particularly stigmatic associations might lead to a different result. *ACLU I*, 655 F.3d at 11 n.14. Thereafter, the Court found release would "substantially infringe this privacy interest[] because [i]t would create the risk—perhaps small, but nonetheless real—that renewed attention would be paid to the individuals who were the subject of these prosecutions." *ACLU v. DOJ*, 750 F.3d 927, 934 (D.C. Cir. 2014) ("*ACLU II*") (internal citation omitted). Ergo, if a list of *acquitted* defendants can draw renewed attention, *id.*, clearly a list of defendants *convicted of terrorism* can do the same.

In sum, a list of convicts whose phones were tracked simply lacks the potential for inciting the kinds of reaction as a list of terrorism convicts, and thus any effort to equate the two fails. Given the stark differences between this particular case and *ACLU I*, the privacy interests of convicted defendants and those who have entered into guilty pleas must be deemed "substantial." *Chase*, 301 F. Supp. 3d at 155 (D.D.C. 2018).

b. The Public Interest That Plaintiffs Have Articulated Is Negligible and Fails to Outweigh the Substantial Privacy Interests.

Given that there are substantial privacy interests which are at stake, the Court now must balance "the competing interests in privacy and disclosure." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). To do so, Plaintiffs' burden is to demonstrate that (1) "the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and that (2) disclosure is "likely to advance that interest." *Id.* Plaintiffs fail to do either.

i. Plaintiffs Fail to Articulate a Significant Public Interest.

As to the fist prong, Plaintiffs begin by asserting that DOJ *conceded* the public interest is significant when it responding to their FOIA request. *See* Pls' Resp. at 16 (citing Compl. Ex. 5). Not so. Exhibit 5 of Plaintiffs' Complaint (the denial of their request for expedited processing) merely states, "[w]hile your client's request clearly concerns an important government activity, you have not demonstrated a time-sensitive need for these records." Compl. Ex. 5. To conflate the requirement of demonstrating that the public interest in disclosure of data is a significant one, *Favish*, 541 U.S. at 172, with the recognition that prosecuting terrorism is an important activity, Compl. Ex. 5, only reveals the weakness in Plaintiffs argument. Indeed, another sentence in the very same paragraph on which Plaintiffs are relying states that "[y]our request for expedited handling of your appeal is denied because you have not shown an 'urgency to inform the public' about an actual or alleged federal government activity[,]'" *id*., which is far more akin to a rejection, rather than a concession, of a significant public interest.

Next, Plaintiffs assert that DOJ mischaracterizes the intent underlying their FOIA request by suggesting, for the first time, that their intent is to confirm or dispel government misconduct. *See* Pls' Resp. at 16 n.20 (citing DOJ Br. 12). But it is Plaintiffs who, in their *pre-litigation* papers,

tried to convince DOJ of the urgency of disclosure by noting it "released a report on individuals convicted of 'international terrorism and terrorism-related offenses' in an effort to justify the President's travel ban on individuals from predominantly Muslim countries." Compl. Ex. 1 at 5. And when the request was denied, Plaintiffs, in pre-litigation papers, repeated that point: "[R]eleasing this data selectively makes the need for comprehensive data even greater, as it permits politicians to cite potentially misleading statistics without confutation." Compl. Ex. 1 at 4. Also, when their appeal was denied by DOJ, it was Plaintiffs who, in filing their Complaint, alleged that, "DOJ's practice of selectively releasing information about international terrorism-related convictions, but not domestic terrorism, makes the need for comprehensive data even greater, as the selectively released data permits politicians to cite potentially misleading statistics without confirmation." Compl. ¶ 26.

Nevertheless, Plaintiffs now, in opposing Defendant's Motion for Summary Judgment, wish to unring the bell because, when the "public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure." *Favish*, 541 U.S. at 174.[3] Even if Plaintiffs now have mixed motives regarding what they will do with the data, they should not be allowed to mask the fact that they purportedly seek to root out misconduct by drowning that declaration in a sea of other proposals to conduct research about immigration laws and policies. Indeed, if that were allowed, *Favish* could be overcome by alleging a post-hoc or a pretextual public interest to avoid *Favish's* "presumption of legitimacy" accorded to "official conduct." *Id.* (citation omitted).

[3] Plaintiffs note that the rule of exemption in *SafeCard Services, Inc.* v. *S.E.C.*, 926 F.2d 1197 (D.C. Cir. 1991), which similarly permits withholding unless data is needed to address misconduct, does not apply here, *see* Pls' Resp. at 16 n.20; in any event, they must address the rule in *Favish*.

Plaintiffs also attempt to distinguish *Favish* because, in that case, the plaintiff had sought records to demonstrate that a law-enforcement investigation was "untrustworthy[.]" *Favish*, 541 U.S. at 161. But Plaintiffs too seek data because they believe certain politicians are untrustworthy. *See* Compl. ¶ 26. And if "bare allegations" of DOJ selectively funneling prosecutorial statistics to politicians to justify immigration policy sufficed to show a significant public interest in disclosure, then Exemption 6 and 7(C) would be "transformed . . . into nothing more than a rule of pleading[,]" particularly because bare "'allegations of misconduct are 'easy to allege and hard to disprove.'" *Favish*, 541 U.S at 174-175 (citation omitted).[4]

Even were this Court to consider Plaintiffs' proffered public interest on its merits, it fails. In response to DOJ's argument that their claimed public interest is foreclosed by *Long v. DOJ*, which upheld withholding of docket numbers based upon plaintiffs' interest in academic inquiry, 450 F. Supp. 2d 42, 63-71 (D.D.C. 2006), Plaintiffs claim *Long* is inapposite because the public interest there was general, whereas they specifically seek to review the merits of immigration laws. *See* Pls' Resp. at 16-17. What Plaintiffs actually seek, however, is to evaluate the President's claimed justifications for promoting such laws, not the merits of how those specific laws function. Plaintiffs' declaration from Ms. Faiza Patel candidly states that she believed DOJ's and the

[4] Because such allegations are easy to allege and hard to disprove, Plaintiffs face a heavy burden. *See, e.g., Blackwell v. FBI*, 646 F.3d 37, 41 (D.C. Cir. 2011) (plaintiff "failed to meet the demanding *Favish* standard," where "[t]he only support [he] offers for his allegation of government misconduct is his own affidavit, which recounts a litany of alleged suspicious circumstances but lacks any substantiation"); *Dunkelberger v. DOJ*, 906 F.2d 779, 781 (D.C. Cir. 1990) ("public's understandable concern over information about an FBI agent's alleged participation in a scheme" did not allege public interest); *Judicial Watch, Inc. v. DOJ*, 898 F. Supp. 2d 93 (D.D.C. 2012) (plaintiff failed to show public interest where he alleged DOJ "scuttled [a] prosecution . . . for political reasons[.]"); *compare Aguirre v. S.E.C.*, 551 F. Supp. 2d 33, 57 (D.D.C. 2008) (allegations much more than "bare suspicion" because they "have been thoroughly documented by two Senate Committees based on a probing investigation of the SEC's activities").

Department of Health and Human Service's report on which the President relied was "misleading," which is why she filed a petition to correct it with DOJ. *See* Declaration of Ms. Faiza Patel ¶¶ 7-8. As she has indicated, the purpose for the corrections is to root out systemic bias. *Id*. at ¶¶ 7, 11. However noble Plaintiffs' motivation may be, the public interest is foreclosed because they are seeking to "evaluate the relationship between the litigant's identity and the government's action[.]" *Long*, 450 F. Supp. 2d at 69 (rejecting this alleged public interest as "overbroad on its face" because "such a sweeping justification would require disclosure of the identities of individuals in virtually all government files that pertain to a government action").[5]

Plaintiffs also proffer that they would use the data to "understand what conduct the government categorizes as relating to 'domestic terrorism'" and the "nature" of domestic terrorism. *See* Pls' Resp. at 17. While Plaintiffs may have a personal interest in exploring the subject matter, it is doubtful that the public has a significant need to understand the "nature" of domestic terrorism or make academic distinctions about how domestic terrorism is categorized in DOJ's database. *Id*. *See Stone v. FBI*, 727 F. Supp. 662, 668 n.4 (D.D.C. 1990) (explaining that courts looks to the public interest in release of the data, "not to the highly specialized interests of those individuals who understandably have a greater personal stake in gaining access to that information"). It is equally doubtful that disclosure would serve FOIA's core purpose of shedding light on what the "government is up to." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773

[5] Plaintiffs seek to distinguish *Long* by pointing out that the plaintiffs in that case had not asserted a public interest in evaluating the relationship between a particular case and government action. *See* Pls' Resp. at 16 n.21 (citing *Long*, 450 F. Supp. 2d at 69-70). But *Long* had only stated that, "*even if one assumes* that evaluating the relationship between individual litigants and government action is a significant public interest that outweighs the privacy interests at stake, plaintiffs still have failed to demonstrate *how disclosure would advance* this asserted public interest." 450 F. Supp. 2d at 69-70 (emphasis added).

(1989). And despite arguments to the contrary, the asserted interests are akin to the overly broad, scholarly inquiries that were rejected by *Long*. 450 F. Supp. 2d 42 at 69-70.[6]

ii. Disclosure Would Not Advance The Public Interest.

As to the second prong that Plaintiffs have the burden of establishing—that disclosure of data is "likely to advance [the public] interest[,]" *Favish*, 541 U.S. at 172—Plaintiffs fail again. Courts here focus on "[e]xamining the incremental value of a given disclosure [which] follows from the basic purpose of the Exemption 7(C) balancing test: determining whether a particular record or piece of information is worth the privacy costs of release[.]" *ACLU II*, 750 F.3d at 937. To meet their burden, Plaintiffs offer that they need the data to evaluate a statistic in a report which DOJ complied in response to an Executive Order. *See* Pls' Resp. at 17-18 (citing Exec. Order No. 13780, 82 Fed. Reg. at 13217 (Sec. 11(a)).

As to the Executive Order that Plaintiffs' reference ("Protecting the Nation From Foreign Terrorist Entry Into the United States"), in Section 11 ("Transparency and Data Collection") the President ordered DOJ to "collect and make publicly available" a list of information. Exec. Order No. 13780, 82 Fed. Reg. at 13217 (§ 11(a)). The category of data about which Plaintiffs are concerned includes the number of foreign nationals charged or convicted with terrorism offenses. Such category is a tiny sliver of the subject matter encompassed within the Order, which includes: the number of foreigners removed based on terrorism-related activity; the number affiliated with

[6] Plaintiffs also offer that Professor Kurzman and the Brennan Center seek to evaluate how terrorism resources and grants are allocated as well as the efficacy of counterterrorism programs. *See* Pls' Resp. at 17. However, even if such information could be gleaned from court filings, "[m]ere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests protected by Exemption 7(C)." *McCutchen v. HHS*, 30 F.3d 183, 188 (D.C. Cir. 1994); *see also Miller v. Bell*, 661 F.2d 623, 630 (7th Cir. 1981) (where public interest was only "to serve as a watchdog over the adequacy and completeness of an FBI investigation . . . this justification would apparently apply to every FBI criminal investigation, severely vitiating the privacy and confidentiality provisions[.]").

a terrorist organization; the number who have provided support to such organizations; the number who have been radicalized after entry; the number who have engaged in terrorism-related acts. *Id*. at § 11(a)(i)-(ii). It also calls for the number of acts of gender-based violence against women; the types of such acts; and any other information that is relevant to public safety, including the immigration status of foreigners charged with major offenses. *Id*. at § 11(a)(iii)-(iv). Moreover, the Order requires that the information date back to September 11, 2001. *Id*. at § 11(b).

Plaintiffs lament the fact that the report only analyzed foreigners charged and convicted of international terrorism related cases without analyzing domestic cases. *See* Pls' Resp. at 17-18. They do not appear to challenge the statistic for the category of international terrorism cases. Rather, they only appear to be interested in providing another statistic regarding domestic cases. More to the point, this data is merely a needle in a haystack of information contained in the Order. Adding it to the mix of existing data would not shed meaningful light on any government activity. In other words, disclosure of the data sought would not incrementally advance the public interest sufficiently to outweigh the substantial privacy interests at stake, particularly when all the other data contemplated by the Order must be made publicly available. *See ACLU II*, 750 F.3d at 937 (stating that when assessing the "incremental value" of the information sought, courts apply the "common sense notion that the value of information depends on the mix of data already publicly available—including that previously released by the agency subject to the FOIA request").[7]

In sum, even if we assume that Plaintiffs proffered more than a negligible public interest, only "exceptional" interests warrant disclosure that would severely intrude on privacy interests.

[7] Furthermore, Plaintiffs concede they had a direct channel to correct perceived errors in the report, which they took advantage of by filing a petition with DOJ, after which they received a direct response from Deputy Assistant Attorney General Michael Allen, who stated that "future reports under Section 11 of Executive Order 13780 [would] better present such information to the public." *See* Declaration of Ms. Faiza Patel ¶ 8. In that regard, the light has been shed on the government.

See Fund for Constitutional Gov't v. Nat'l Archives & Records Serv., 656 F.2d 856, 867 (D.C. Cir. 1981). Balanced against the substantial privacy interests here, the FOIA must be rejected.[8]

III. The Balance of Interests Weighs Strongly in Favor of Withholding the Requested Information for Cases Resulting in Acquittals or Dismissals.

Contrary to Plaintiffs' assertion, DOJ never claimed that *ACLU II* categorically exempts docket information for acquittals or dismissals and agrees that the inquiry into the strength of a privacy interest is context-dependent. *See* Pls' Resp. at 19. Where DOJ differs is in concluding *ACLU II* exempts the docket information in this particular case, but not as a categorical matter. Indeed, just as *ACLU I* found that "a FOIA request might be worded in such a way as to generate a list of convictions that, because of particularly stigmatic associations or otherwise, could draw special attention to the names on the list and so create heightened privacy concerns," *ACLU I*, 655 F.3d at 11 n.14., so too, a request may be worded in a way that generates a list of *acquittals* which, because of a low-risk for stigma (say, speeding tickets as opposed to terrorism charges), could draw less attention and thus create diminished privacy concerns. This is plainly not that case.

a. The Privacy Interest in Docket Information for Cases Resulting in Acquittals or Dismissals Is Substantial.

The same reasons above explaining why the privacy interest in docket information for convictions is substantial apply with far greater force to information for acquittals and dismissals. Plaintiffs, however, offer three reasons why the privacy interest is barely more than de minimis.

[8] Plaintiffs make no effort to rebut DOJ's argument that its website has an entire section devoted to providing data about terrorism cases, other than to say such information is "not sufficient for evidence-based research and policy debate on counterterrorism policies and practices." *See* Declaration of Professor Charles Kurzman ¶ 9. This alternative source of data substantially discounts the public interest in this particular case. *See Ray*, 502 U.S. at 178 (citation omitted). Plaintiffs also make no effort to rebut the countervailing public interest in non-disclosure since disclosure can re-stigmatize individuals and diminish their prospects for successful reintegration. *See* Def't Mot. at 18.

First, Plaintiffs claim that the chance for renewed publicity that concerned *ACLU II* is not at issue here because there are 724 persons at issue as compared to six. *See* Pls' Resp. at 20-21.[9] However, by recognizing the chance for renewed publicity was a concern that animated *ACLU II,* Plaintiffs appear to implicitly recognize the danger in disclosing such a list, as *ACLU II* observed. Nevertheless, they reason that if such list were disclosed, each innocent person would be protected from publicity because they would be "buried" in 724 names, as opposed to six in *ACLU II*. *Id*. But it is unclear why 724 is such a magic number that the chance for publicity would disappear. Such a rule is simply unworkable. The only safeguard is to withhold the entire list.[10]

Second, Plaintiffs note that DOJ occasionally issues press releases. *See* Pls' Resp. at 21. But that is beside the point since there is no dispute that the information in *all* 724 cases is public. Indeed, "the fact that such defendants were accused of criminal conduct may remain a matter of public record" does not mean they are not "entitled to move on with their lives without having the public reminded of their alleged but never proven transgressions." *ACLU II*, 50 F.3d at 933. Thus, the notion that DOJ waived the rights of all 724 innocent people to not have private information

[9] Plaintiffs allege disclosure would not "alert the public to the fact that one had been charged, let alone *for the first time*[,]" *id.*, (emphasis in original), but they also recognize that the chance of *renewed* publicity was a concern that animated *ACLU II*. *Id*.; *see ACLU II*, 750 F.3d at 934-35 ("[I]f an 'ordinary citizen' has a privacy interest 'in the aspects of his or her criminal history that may have been wholly forgotten,' certainly that interest is particularly great when the ordinary citizen was never actually convicted but nonetheless might be presumed by the public to have been guilty") (quoting *Reporters Comm.*, 489 U.S. at 769); *see also Rose v. Dep't of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974) ("a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information"), *aff'd*, 425 U.S. 352 (1976).

[10] Plaintiffs suggest that if DOJ populated the fields for docket numbers in LIONS, the individuals would face no more of an infringement than the continued existence of dockets on PACER. *See* Pls' Resp. at 21 n.4. But they concede they have no way to access such individuals *because* DOJ does not automatically populate the fields, which is why DOJ does so—to protect their privacy.

disclosed because *some* press releases had been issued is belied by Plaintiffs' own FOIA request, which would be unnecessary to file if all of the data that Plaintiffs' seek were readily accessible.[11]

Third, Plaintiffs claim they do not intend to contact the individuals. *See* Pls' Resp. at 22. But "personal reasons for requesting disclosure are not a consideration under the FOIA analysis." *Bloomgarden v. Nat'l Archives & Records Admin.*, 344 F. Supp. 3d 66, 75 (D.D.C. 2018) (citation omitted). Nevertheless, Plaintiffs reject as speculation the notion that any of the 724 individuals could be contacted in the wake of DOJ disclosing the court docket numbers. *See* Pls' Resp. at 22. The Brennan Center, however, publishes research on its public website. *See* Declaration of Ms. Faiza Patel ¶ 5. And if disclosing the court docket numbers in *ACLU II* could create the risk—"perhaps small, but nonetheless real"—of new attention to defendants who had tracked phones, 750 F.3d at 934, certainly there is an even greater risk as to persons charged with terrorism. Plaintiffs are thus in no position to guarantee any of the 724 individuals will not be contacted for "once there is disclosure, the information belongs to the general public." *Favish*, 541 U.S. at 174.

b. The Public Interest in Learning About DOJ's Prosecution of Terrorism Is Not Significant and Fails to Outweigh the Privacy Interests at Issue.

As an initial matter, the negligible public interest described on pages 9 to 13 *supra* as to data related to convictions and pleas applies with equal force to acquittals and dismissals. Nonetheless, Plaintiffs assert that, "[w]hile the interest in *ACLU II* also involved an important policy issue, the public interest here is greater: this administration has pushed this data into the

[11] Plaintiffs suggest "smoke in mirrors" as to attempts to shield privacy where press releases issued. *See* Pls' Resp. at 22. Plaintiffs fail to consider that when a press release is issued, the government is still attempting to prove a person committed a crime, but after a press release has been issued, "the government, having brought the full force of its prosecutorial power to bear against individuals it ultimately failed to prove actually committed crimes, has a special responsibility—a responsibility it is fulfilling here—to protect such individuals from *further* public scrutiny." *ACLU II*, 750 F.3d at 935 (emphasis added).

spotlight *using it selectively to support its marquee policy proposals*." Pls' Resp. at 22-23 (emphasis added). However, as argued above, Plaintiffs have failed to offer any evidence to suggest any official negligently or intentionally manipulated data to justify policy.

Finally, Plaintiffs try distinguishing *ACLU II* based on percentages, not whole numbers. Although *ACLU II* found disclosure of docket numbers for six acquittals would only marginally advance the public interest where docket numbers for 214 convictions had already been disclosed, Plaintiffs argue this case differs because they seek data for 724 acquittals and 3,772 convictions. In that case, the docket numbers for the acquittals represent 16% (as opposed to 3%) of the data. *See* Pls' Resp. at 23. Plaintiffs reason that this 16% of the data will reveal a "tremendous" amount. *Id*. But the issue of whether court docket numbers for acquittals should be disclosed, however, is only reached if the Court has concluded the other 84% or 3,772 convictions should be disclosed, given that the privacy rights of the acquitted are greater than the privacy rights of the convicted. Thus, assuming the 3,772 convictions should be disclosed, it strains credulity to think disclosing 724 acquittals would reveal a *tremendous* amount not already revealed by 3,772 convictions.

Indeed, like *ACLU II*, disclosure of the additional cases—disclosure which would impinge the rights of 724 legally innocent individuals—would only marginally advance the public interest. *See ACLU II*, 750 F.3d at 935 ("Given the fundamental interest individuals who have been charged with but never convicted of a crime have in preventing the repeated disclosure of the fact of their prosecution, we have little hesitation in concluding that release of the remaining information the ACLU seeks 'could reasonably be expected to constitute an unwarranted invasion of personal privacy'") (citing 5 U.S.C. § 552(b)(7)(C)). And if *ACLU II* had "little hesitation" in concluding the release of data for six cases after 212 were disclosed would likely invade personal privacy, *id*., this Court should have no hesitation in concluding release of data for 724 cases would do so too.

The same reasons the scale weighs in favor of privacy with regard to convictions and pleas make the scale weigh even more in favor of privacy with regard to acquittals and dismissals. Accordingly, Defendant respectfully requests that the Court uphold its withholdings based on FOIA Exemptions 6 and 7(C).

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant summary judgment in its favor.

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Respectfully submitted,

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